IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.845 OF 2004

Maharashtra Association of
General Workers, C-1
Dattatraya Apartment,
Dhanukar Wadi, Kandivali
(West), Mumbai - 400 067. .. Petitioner.

V/s.

1. M/s.Steelage Industries Ltd.
   Opp. Mazgaon Post Office,
   Mazgaon, Mumbai - 400 010.

2. Shri D. Khetrapal, Director
   M/s.Steelage Ind. Limited,
   Opp. Mazgaon Post Office,
   Mazgaon, Mumbai - 400 010

3. Shri A.R. Gujjar, Personal
   Manager, M/s.Steelage Ind.
   Limited, Opp. Mazgaon Post
   Office, Mazgaon, Mumbai

4. Shri P.P. Patil, Hon'ble
   Member, Industrial Court,
   New Administrative Builidng,
   Bandra (E), Mumbai-400 051 .. Respondents.

Mr.A.D. Shetty, Advocate for the petitioner.

Mr.P.K. Rele, Senior Advocate with mr.Rajesh Rele i/b. Piyush Shah for the respondents.

CORAM : J.P. DEVADHAR, J.

DATED : 14TH JULY, 2005.

ORAL JUDGMENT :

1. This petition arises out of the judgment and order dated November 20, 2003 passed by the Industrial Court at Mumbai dismissing Complaint (ULP)

No.312 of 1997 filed by the petitioner-union. Although the said complaint was filed under Section 28 and 30 read with Item 6 of Schedule II and Item 5,6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 ('Act' for short), the learned counsel for the petitioner restricted his argument relating to the unfair labour practices covered under to Item 6 of Schedule IV of the Act. Therefore, the only question required to be considered in this writ petition is whether the respondent No.1 company committed unfair labour practices covered under Item 6 of Schedule IV of the Act.

2. The respondent No.1 company was engaged in the manufacture of steel furniture and safe having its factory at Mazgaon, Mumbai - 400 010. The respondent No.1 company employed more than 300 permanent / temporary / casual workmen for carrying out their manufacturing activities.

3. It is the case of the petitioner-union that 15 workmen whose names have been set out in Annexure 'A' to the Complaint No.312 of 1997 were employed by the respondent No.1 company since 1983 as helpers. It is the case of the petitioner-union that the said

workmen have rendered services in the respondent No.1 company for several years and the company had given break in service from time to time in order to deprive the workmen the benefits of permanency.

4. By a notice dated 14-10-1992 the respondent No.1 company declared lock-out with effect from October 29, 1992. The said lock out was lifted on September 5, 1993. The lifting of lock out was advertised in newspapers and individual notices were also given to the permanent employees of the company to resume duty. No notice was issued to the 15 workmen belonging to the petitioner-union. On March 29, 2004, the petitioner-union addressed a letter to the company on behalf of the 15 workmen stating therein that no work has been given to the 15 workmen even after the lifting of the lock out on September 5, 1993. As the company failed to reply, the petitioner-union filed Complaint (ULP) No.401 of 1997 in the Industrial Court at Bombay under Section 28 and 30 read with Item 9 and 10 of Schedule IV of the Act. The said complaint was dismissed by the learned Judge of the Industrial Court on September 24, 1996 on the ground of limitation. On a writ petition bearing No.321 of 1997 filed by the petitioner union, Kapadia, J. (as His Lordship then was) by a judgment and order dated March 12, 1997 while dismissing the

writ petition clarified that in case the petitioner union files a complaint claiming permanency on the basis that they were to be treated as temporary employees, the company would not plead constructive res judicata or res judicata with regard to the question of permanency.

5. Thereupon, the petitioner-union filed the above Complaint (ULP) No.312 of 1997 before the Industrial Court at Mumbai. As stated earlier, though the said complaint was filed under Section 28 and 30 read with Item 6 of Schedule II and Item 5,6 and 9 of Schedule IV, the learned counsel for the petitioner has restricted his argument to Item 6 of Schedule IV of the Act. In the said Complaint the union claimed permanency in service for the 15 workmen mainly on the ground that the workmen had completed 240 days of continuous service in a calendar year. It was contended that the 15 workmen were in service on the date of lock-out after the lifting of the lock out, the respondent No.1 company had not given any work to the 15 workmen and, therefore, the said workmen are entitled to full wages from the date of lifting of the lock out i.e. September 5, 1993.

6. The respondent No.1 company filed its

written statement opposing the claim of the Union. It was stated that the 15 workmen were employed as casual workmen and not temporary workmen as and when the work was available. It was stated in the written statement that the workmen had not completed 240 days of continuous service in a calendar year and the workmen were not in employment on the date on which the lock out was declared and, therefore, the question of permitting the 15 workmen to resume duty did not arise at all. It was stated that in fact none of the 15 workmen had report for duty which clearly shows that they were not desirous of resuming the duty because they were not in the employment. It was further stated that since the 15 workmen were not in employment of the company at the time of effecting the lock out the question of calling them to report for duty after the lifting of the lock-out does not arise at all.

7. During the trial before the learned Judge of the Industrial Court, the petitioner -union examined Mr.Prakash Ghadi and Mr.Tulshiram Tambe as its witnesses and the company examined Mr.Eknath Doke, Factory Manager as its witness. After perusal of the evidence and hearing arguments of both the sides, the learned Judge of the Industrial Court by the impugned judgment dated November 20, 2003 dismissed the

complaint of the petitioners on the ground that the petitioner-union failed to establish by documentary evidence that the workmen had completed 240 days of continuous service in a calendar year. The learned Judge of the Industrial Court held that the complainant union failed to establish that the respondent No.1 company engaged in unfair labour practices. It was further held that before the lock out was effected, the workmen were not in their employment and no evidence was led to establish that even after the lock out was lifted, the workmen were serious to report for duty. Accordingly, the complaint filed by the petitioner-union was dismissed. Challenging the aforesaid decision of the Industrial Court, the present petition is filed.

8. Mr.Ashok Shetty, learned advocate appearing on behalf of the petitioners fairly stated at the outset that the petitioner-union could not establish before the Industrial Court that the 15 workmen had completed 240 days of continuous service in a calendar year. Therefore, he is not pressing the claim of permanency on the ground that the 15 workmen had completed 240 days of continuous service in a calendar year. However, the learned counsel for the petitioners submitted that the petitioners had established that the workmen had rendered service as

temporary workmen for years together and the company gave brake in service at regular intervals with a view to deprive benefit of permanency to the workmen. Thus, according to the counsel, the petitioners had established that the respondent No.1 company had committed unfair labour practices covered under Item 6 of Schedule IV of the Act. Referring to the evidence of the companies witness, the learned counsel for the petitioner submitted that it is not in dispute that the 15 workmen were serving in the company for years together as temporary workmen. It is not in dispute that no notice of termination was given to these workmen at any point of time. The workmen were not called upon to report for duty after the lock out was lifted. According to the learned counsel, in the absence of any specific termination order, the workmen continued in service as temporary workmen and failure on the part of the respondent No.1 company to give work to the workmen who has put in years of service is squarely covered under Item 6 of Schedule IV to the Act. In the absence of any termination order, the learned counsel for the petitioner submitted that the Industrial Court was in error in holding that the workmen were not in service on the date on which the lock out was declared.

9. As regards the Memorandum of Settlement

dated May 31, 1991, the learned counsel for the petitioner submitted that the said settlement is not binding because the workmen of the petitioner union were not the members of the union which entered into settlement with the company. He submitted that it is not in dispute that the workmen of the petitioner-union were continued in service even after the settlement was arrived at by the respondent No.1 company with the Association of Engineering workmen on May 31, 1991. Similarly agreement dated May 3, 1993 and September 5, 1993 entered into by and between the representative of the workmen and the respondent No.1 company are also not applicable because the workmen of the petitioner union are not parties to the said agreement.

10. According to the learned counsel for the petitioner, to attract Item 6 of Schedule IV it is not necessary that the workmen must have completed 240 days of continuous service in a calendar year. According to the learned counsel, it is also not necessary that the workmen should be in service on the date of the filing of the complaint. In other words, according to the learned counsel even a temporary workmen who is not in service is also entitled to invoke Item 6 of Schedule IV. In the present case, service of 15 workmen were not

terminated and, therefore, the question of their being not eligible to claim the benefit of Item 6 does not arise at all. In any event, the learned counsel submitted that once it is established that the workmen were in temporary service for years together and the company gave them brake in service at regular intervals it is sufficient to draw an inference that the object of the company was to deny benefit of permanency to the workmen. In support of his contention, the learned counsel for the petitioner relied upon the judgment of the Apex Court in the case of Chief Conservator of Forests & Anr. V/s. Jagannath Maruti Kondhare [1996 I CLR 680]. In that case the Apex Court held that despite long years of service the workmen were continued as casuals was sufficient to draw the inference that the same was done with the object of depriving the workmen of the status and privileges of permanent employees.

11. The learned counsel relied upon the Division Bench judgment of this court in the case of R.P. Sawant & Others V/s. Bajaj Auto Ltd. & Another [2001-II-LLJ 1349]. In that case, the Division Bench of this Court following the decision of the Apex Court in the case of Chief Conservator of Forests (supra) held that denial of permanency was in breach of Item 6 of Schedule IV. The learned counsel for

the petitioner, however, fairly stated that the aforesaid Division Bench decision of this Court was carried in appeal before the Apex Court wherein the matter was settled. The decision of the Supreme Court is reported in [2003 II CLR 466] wherein the Apex Court has held that in view of the settlement, the questions decided by the High Court are left open and will not be treated as precedent on law or on fact. The learned counsel for the petitioner submitted that he is relying on the judgment of the Division Bench not as a precedent but only to support his contention.

12. The learned counsel further relied upon the judgment of the Apex Court in the case of Bajaj Auto Ltd. V/s. Bhojane Gopinath D. [2004 I CLR 502] and also the decision of this Court in the case of Burroghs Welcome (I) Ltd. V/s. D.H. Ghosle & Ors. [2000 III CLR 264] and submitted that in view of continuous temporary service of the workmen for a number of years, the workmen of the petitioner-union are entitled to the permanency and the Industrial Court was in error in dismissing the complaint filed by the petitioner-union.

13. Mr.Rele, the learned senior Advocate appearing on behalf of the respondent No.1-company

while supporting the judgment and order passed by the Industrial Court submitted that since inception the case of the petitioner was that the workmen were entitled to claim permanency in service on account of their completing 240 days of continuous service in a calendar year. Having failed to establish that they have completed 240 days of continuous service in a calendar year in their earlier complaint filed in the year 1994, the petitioners had filed the above complaint in the year 1997 as an after thought alleging unfair labour practice on the part of the company covered under Item 6 of Schedule IV of the Act. He submitted that no evidence is adduced by the petitioner to show that unfair labour practice covered under Item 6 of Schedule IV has been committed by the respondent No.1 company. He submitted that in the present case, to the extent permissible, the respondent No.1 company has absorbed temporary workmen as permanent workmen after negotiating with the recognised union as can be seen from the deed of settlement dated May 31, 1991. According to the learned counsel for the respondent No.1 company, the 15 workmen of the petitioner-union were not in service on the date on which the lock out was declared and, therefore, the question of calling the workmen of the petitioner-union on duty after lifting of the lock out did not arise at all.

According to the learned counsel, the fact that 28 temporary workmen have been made permanent as per the settlement dated May 31, 1991 was known to the workmen of the petitioner union. In fact, Mr.Prakash Ghadi a witness of the petitioner union was a member of the union which had entered into settlement with the respondent No.1 company on May 31, 1991. Therefore, it is not open to the workmen of the petitioner-union to allege that the settlement dated May 31, 1991 is not applicable to the workmen of the petitioner-union and in any event, the case of the petitioner that the temporary workmen were continued with a view to deny permanency does not survive.

14. The learned counsel for respondent No.1 further submitted that none of the 15 workmen of the petitioner-union continued in temporary service after December, 1991. Thus on 29-10-1992 the date on which the lock out was declared, the workmen of the petitioner union could not be said to be in service of the company. The learned counsel for the petitioner further submitted that the petitioner failed to establish that the brake in service was given deliberately with a view to deny permanency to the temporary workmen. The petitioners have not established that the work was denied to the workmen even though the work was available or that the

service of some other temporary employees were engaged instead of the 15 workmen of the petitioner union with a view to deprive their claim of permanency. He submitted that from the pay-slips produced by the workmen it can be seen that there was no set pattern to give break in service with a view to deny permanency. He submitted that the mere fact that the services of the workmen were engaged for years together in temporary service does not establish unfair labour practice under Item 6 of Schedule IV unless the petitioners establish that the object of the company to continue the workmen in temporary service was to deprive the workmen the claim of permanency.

15. Mr.Rele, relied upon the judgment of this Court in the case of Patel Engineering Works V/s. Sri Santosh Kumar Rawool & 13 Ors. [2001 I CLR 574], decision of this Court in the case of Punjabrao Krishi Vidyapeeth (by its Registrar), Akola V/s. General Secretary, Krishi Vidyapeeth Kamgar Union & Another [1994 - II L.L.N. 517], decision of the Apex Court in the case of Mahatma Phule Agricultural University & Others V/s. Nasik Zilla Sheth Kamgar Union & Others [(2001) 7 SCC 346] and submitted that whether a company has committed unfair labour practices has to be seen in the facts of each case

and if the company establishes that no vacancy in permanent posts exists, then even though the temporary workmen may have worked for long period of time, their services cannot be regularised or made permanent. The learned counsel further submitted that the respondent No.1 company has closed down its business permanently w.e.f. March 31, 2004 and, therefore, the question of absorbing the temporary employees does not arise. Accordingly, the learned counsel for the respondent No.1 company submitted that no interference is called for and the petition is liable to be dismissed.

16. Before dealing with the merits of the case, it would be necessary to set out Item 6 of Schedule IV which reads as under :

> ‘6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.’

17. In the present case, it is not in dispute that the 15 workmen belonging to the petitioner-union were in temporary service as temporary workmen/ casuals for several years. Although the petitioner-union has not specifically set out the number of days worked by them in each year, it is not in dispute that the workmen had rendered service as

helpers for several years and that their temporary service did not exceed 240 days in any calendar year. It is also not in dispute that neither the appointment letter nor the termination letters were issued to the worker at any point of time. The workmen were engaged for a limited period whenever the work was available and on expiry of the period, their services came to an end automatically. Perusal of the pay-slips produced by the workmen shows that their services were engaged on different occasions in a year and there is no set pattern in engaging their service. The petitioner-union has not adduced any evidence to show that the company had given break in service to the workmen with a view to deny permanency. It is also not the case of the petitioner that the work was available but by giving break in service to the workmen of the petitioner union, the company engaged some other employees with a view to deny permanency to the workmen of the petitioner union. Therefore, in the absence of any material to show that even though work was available, break in service was given to the workmen of petitioner union with a object to deny permanency, it cannot be said that the company has committed any unfair labour practice.

18. It is well established in law that the mere

fact that the workmen were in temporary service for long years itself is not sufficient to attract Item 6 of Schedule IV and it is necessary for the workmen to establish that the work was available but the company instead of continuing the services of the existing workmen, gave break in service and employed other workmen / casual / temporary workmen with the object of depriving the existing workmen the status and privileges of a permanent employees. As the workmen failed to establish this aspect of the matter, it cannot be said that the company has committed any unfair labour practice.

19. In the present case, the fact that the company had entered into a memorandum of settlement with the union representing the temporary workmen on May 31, 1991 wherein it was mutually decided to absorb 28 temporary workmen as permanent employees in a phased manner, clearly shows that there was no intention on the part of the respondent No.1 company to deny the status of permanency to the temporary workers. On the contrary, the memorandum of settlement clearly shows that the temporary workmen have been made permanent to the extent possible. The said settlement dated May 31, 1991 may not be binding on the workmen of the petitioner union but the said settlement clearly establishes the bona fides of the

respondent No.1 company.

20. The decision of the Apex Court in the case of Chief Conservator of Forests (supra) which is strongly relied upon by the learned advocate for the petitioner is distinguishable on facts. In that case the Apex Court has clearly held that an adverse inference can be drawn depending upon the facts of each case and the Apex Court has not laid down any general preposition that in each and every case the employee who has put in temporary services for a number of years shall be entitled as a matter of right to claim permanency under Item 6 of Schedule IV of the Act. In the facts of the present case, the petitioners have not established that the object of the respondent No.1 company was with a view to deny permanency to the workmen. On the contrary the respondent No.1 company has established that to extent permissible the temporary workmen have been given permanency. Therefore, the decision of the Apex Court in the case of Chief Conservator of Forests do not support the case of the petitioner.

21. The Division Bench judgment of this Court in the case of Bajaj Auto Limited (supra) relied upon by the petitioner is also distinguishable on facts. In that case the Industrial Court had given a

categorical finding that the company has engaged the services of the employees by rotation and the company had taken care to appoint temporary employees for a specific period of seven months; after the service of one group was terminated, next group remained on duty; after the completion of the period of seven months third group remained on duty. It was held that during all the 12 months the cycle continued and there was not a single day on which there was not a single temporary employee engaged by the company. In the present case there is no evidence led by the petitioner union to the effect that the break in service was deliberately given and in place of 15 workmen of the petitioner union any other workmen were employed by the respondent No.1-company. Therefore, the decision of the Division Bench is distinguishable on facts.

22. The fact that there is difference in wages between the temporary workmen and the permanent workmen does not by itself establish that the workmen were continued in temporary service deliberately and in any event, in the absence of any cogent evidence it cannot be said that the company has committed unfair labour practice covered under Item 6 of Schedule IV of the Act.

23. For all the aforesaid reasons, I see no reason to interfere with the impugned judgment and order passed by the Industrial Court. Accordingly, the petition fails. Rule stands discharged with no order as to costs.

(J.P. DEVADHAR, J.)